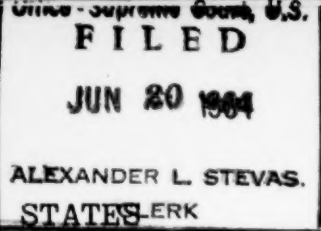


83-2112 (1)



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

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NO.  
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IN RE:

DAVID WAYNE COPPIE & BETTY ANN  
COPPIE, Debtors;

GORDON E. GOUVEIA, TRUSTEE,  
Petitioner,

vs.

HAMMOND CLINIC,  
Respondent.

-----  
IN RE:

RAY MARVIN McCOWEN, Debtor;

GORDON E. GOUVEIA, TRUSTEE,  
Petitioner,

vs.

GENERAL FINANCE COMPANY,  
Respondent.

\_\_\_\_\_  
PETITION FOR A WRIT OF  
CERTIORARI TO THE COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT  
APPENDIX ATTACHED  
\_\_\_\_\_

GORDON E. GOUVEIA  
Attorney for Petitioner  
Greco, Gouveia, Miller,  
Pera & Bishop  
518 East 86th Avenue  
Merrillville, IN 46410  
Telephone: (219) 738-2988

65PD



QUESTION PRESENTED FOR REVIEW

Did the Lower Courts err as a matter of law in holding that a transfer of the Debtor's wages earned within the 90 day preference period, pursuant to a State Court Garnishment Order issued prior to the 90 day preference period, was not a preferential transfer as defined in 11 U.S.C. Section 547 (Supp. II 1978)?





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# THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

IN WHICH ARE CONTAINED THE

REMARKABLE PASSAGES OF HIS REIGN

FROM HIS MARRIAGE TO HIS DEATH

BY SAMUEL JOHNSON

IN TWO VOLUMES

LONDON: Printed by J. B. & C. 1794

IN TWO VOLUMES

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CHAPTER I

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### OPINIONS BELOW

The initial opinions of the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division at Gary, involved two cases which were consolidated on appeal at the United States Court of Appeals for the Seventh Circuit. The cases were titled In Re Coppie; Gordon E. Gouveia, Trustee, vs. Hammond Clinic, Bankruptcy Case No. 81-60431, Adversary Proceeding No. 82-6094 (entered December 28, 1982); and In Re McCowen; Gordon E. Gouveia, Trustee, vs. General Finance Company, Bankruptcy Case No. 82-60020, Adversary Proceeding No. 82-6095 (entered December 30, 1982). Neither of these cases were reported, but both are reprinted in the Appendix at pages A-14 through A-27.

The Per Curiam Decision of the United States Court of Appeals for the Seventh

## EXHIBIT

The first condition of the law is that the person who is to be admitted to the United States must be a native-born citizen of the United States. This is the first condition of the law. The second condition is that the person must be a native-born citizen of the United States. This is the second condition of the law. The third condition is that the person must be a native-born citizen of the United States. This is the third condition of the law. The fourth condition is that the person must be a native-born citizen of the United States. This is the fourth condition of the law. The fifth condition is that the person must be a native-born citizen of the United States. This is the fifth condition of the law. The sixth condition is that the person must be a native-born citizen of the United States. This is the sixth condition of the law. The seventh condition is that the person must be a native-born citizen of the United States. This is the seventh condition of the law. The eighth condition is that the person must be a native-born citizen of the United States. This is the eighth condition of the law. The ninth condition is that the person must be a native-born citizen of the United States. This is the ninth condition of the law. The tenth condition is that the person must be a native-born citizen of the United States. This is the tenth condition of the law.

Circuit entered March 1, 1984, under the Cause Numbers of 83-1226 and 83-1227, is reported at 728 F.2d 951 (1984). A copy of the slip opinion of that Court appears in the Appendix at pages A-3 through A-11.

The Seventh Circuit Court of Appeals' Order denying the Petition for Rehearing entered March 30, 1984, is as yet unreported, and is set out in the Appendix at pages A-12 through A-13.

#### JURISDICTION

The final judgment of the United States Court of Appeals for the Seventh Circuit affirming the Order of the Bankruptcy Judge, was entered March 1, 1984. Petitioner thereafter, in a timely manner, filed a Petition for Rehearing and Suggestion for Rehearing in Banc. Said Petition was denied

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by the Court on March 30, 1984. This Court has jurisdiction pursuant to 28 U.S.C. Section 2101(c).

CONSTITUTIONAL  
PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States, Article One, Section Eight, Clause Four, provides Congress in pertinent part with the power "to establish \*\*\* uniform laws on the subject of bankruptcies throughout the United States".

11 U.S.C. Section 547(e)(3) (Supp. II 1978), in defining when a preferential transfer occurs, provides as follows:

"(3) for the purpose of this Section, a transfer is not made until the debtor has acquired rights in the property transferred."

THE COURT OF COMMONS  
IN PARLIAMENT ASSEMBLED  
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## STATEMENT OF THE CASE

Debtors David Wayne Coppie and Betty Ann Coppie filed a Chapter 7 Petition in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division at Gary, on March 20, 1981. Prior to said filing, on December 3, 1980, the Lake County Superior Court issued a garnishment order against the Debtor's wages. Between December 21, 1980, and March 20, 1981, a period of 90 days prior to the bankruptcy filing, the Hammond Clinic garnished the sum of \$608.01 from the wages earned by the Debtor during that same period. On March 26, 1982, Gordon E. Gouveia, Trustee of the bankrupt estate and Petitioner herein, filed a Complaint against the Hammond Clinic for turnover of this preferential transfer.

Debtor Ray Marvin McCowen filed a Chapter 7 Petition in the United States Bankruptcy



Court for the Northern District of Indiana, Hammond Division at Gary, on January 8, 1982. Prior to said filing, on March 20, 1980, the Lake County Circuit Court issued a garnishment order against the Debtor's wages in favor of General Finance Company. Between October 11, 1981, and January 8, 1982, a period of 90 days prior to the bankruptcy filing, General Finance Company garnished the sum of \$764.36 from the wages earned by the Debtor during that same period. On May 26, 1982, Gordon E. Gouveia, Trustee of the bankrupt estate and Petitioner herein, filed a Complaint against General Finance Company demanding turnover of the garnished wages on the grounds they constituted a preferential transfer.

On December 28, 1982, and December 30, 1982, pursuant to Petitioner's Motions for Summary Judgment, the United States Bankruptcy Court issued its Orders whereby it determined that the sums withheld from the



aforementioned wages of the Debtor by the Hammond Clinic and General Finance Company, respectively, pursuant to the aforesaid garnishment orders, did not constitute preferential transfers. (Appendix, pages A-14 and A-21). Petitioner then filed his Notices of Appeal with the United States District Court for the Northern District of Indiana on January 7, 1983. (Appendix, pages A-28 and A-30).

The issues presented by both cases are identical and, therefore, on February 10, 1983, the United States Court of Appeals for the Seventh Circuit ordered that the two cases be consolidated on appeal. (Appendix, page A-36). On March 1, 1984, the Court of Appeals entered its decision affirming the Order of the Bankruptcy Judge. (Appendix, page A-1). Thereafter, Petitioner filed his Petition for Rehearing and Suggestion for Rehearing in Banc. Said Petition was denied



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by the United States Court of Appeals for the Seventh Circuit on March 30, 1984. (Appendix, page A-12). On the basis of these facts, this case now comes before this Honorable Court on the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

#### REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ADDRESSES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED AND SETTLED BY THIS COURT.

As noted by the Seventh Circuit in its opinion, "many courts" have confronted this factual situation, but there is no consensus as to whether the garnishment in this situation constitutes a preferential transfer. (Appendix, page A-6). In addressing this issue, the various federal courts have ruled both ways, and the Court's reasonings reflect the fact that the Courts are unable to inter-

by the United States Court of Appeals for the

Second Circuit in the case of *United States v. [illegible]*

the Court held that the [illegible] was not a [illegible]

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UNITED STATES COURT OF APPEALS

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
IN THE CITY OF NEW YORK  
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK  
FILED FOR APPEAL IN THE SECOND CIRCUIT  
JANUARY 10, 1964

IT IS ORDERED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THAT THE APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IN CASE NO. 63-10000, BE DENIED, AND THAT THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IN CASE NO. 63-10000, BE AFFIRMED, WITHOUT COST TO EITHER PARTY.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS J. WATERMAN, CLERK

BY THE COURT: [illegible]

THE CLERK OF THE COURT: [illegible]

pret what Congress intended in the enactment of 11 U.S.C. Section 547(e)(3) (Supp. II 1978). Indeed, Petitioner herein contends that the Court below erred not only in interpreting Congressional intent, but also in the application of long-standing principles of federalism as set forth by this Court over the years.

The Constitution of the United States grants Congress the power to establish uniform laws on the subject of the bankruptcy throughout the United States. U.S. Constitution, Article I, Section 8, Clause 4. Although that power may be exercised concurrently with the States, once Congress chooses to exercise its constitutionally granted power, that power is paramount and transcends as well as suspends all inconsistent State laws. See generally Marine Harbor Properties, Inc., v. Manufacturers Trust Co., 317 U.S. 78, 83 (1942). Indeed

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the United States Supreme Court has stated that:

"The States cannot, in the exercise of control over local law and practice, vest State Courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and, under this power, Congress can limit the jurisdiction which the Courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."

See Kelb v. Feuersten, 308 U.S. 433, 439 (1939). Thus, the only question before the Court is whether State or Federal law controls when the Debtor's property is "transferred", which constitutes a federal question. See 4 Collier on Bankruptcy, Paragraph 547.46 (15th ed.).

Bankruptcy originated as a seizure of the Debtor's assets for equitable distribution among creditors. Kuehner v. Irving Trust Co., 299 U.S. 445, 450 (1937). Historically, one of the primary purposes of the bank-



ruptcy law was to bring about a ratable distribution of the Debtor's assets among creditors, thereby protecting creditors from one another. Young v. Higber Co., 327 U.S. 204, 210 (1945); see also Kuehner, supra at 451. One of the provisions designed toward that end, and therefore clearly within Congress' constitutional powers, is 11 U.S.C. Section 547 (Supp. II 1978), the section of the Code dealing with preferential transfers.

The issue presented here is whether the transfer of the Debtor's wages earned within the 90 day preference period, pursuant to a garnishment order issued by a State Court prior to the 90 day preference period, constitutes a preferential transfer as defined in Section 547. Thus, it becomes essential to determine when the wages are "transferred." Is it when the garnishment order is issued or when the wages are earned by the debtor and paid over to the creditor?





The Lower Court has decided that the wages are transferred when the State Court issues the garnishment order. The Petitioner contends this is in error.

In Section 547(e)(3), Congress has explicitly provided that:

"(3) for the purpose of this section, a transfer is not made until the Debtor has acquired rights in the property transferred."

This section was specifically designed to overrule the Seventh Circuit's decision in Grain Merchants of Indiana, Inc., v. Union Bank and Savings Co., 408 F.2d 209 (7th Cir. 1969). Sen. Rep. No. 95-989, 95th Cong., 2nd Sess. 89 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 374 (1978). Thus, the analogy between Grain Merchants and the present case must be examined in light of Congress' intent as expressed in Section 547 (e)(3).

The Court has held that the  
state has a strong interest in the  
protection of the public health and safety.  
The state has a duty to protect the  
public health and safety.

In the case of *State v. [Name]*,  
the court held that the state has a  
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held that the state has a duty to  
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The court held that the state has a  
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The court held that the state has a  
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protect the public health and safety.

The Lower Court distinguishes Grain Merchants from the garnishment situation based on Indiana garnishment law. The Court is correct in its assertion that State law generally governs when a transfer occurs. See Grain Merchants, 408 F.2d at 212; see also Stanton v. New, 283 U.S. 318, 822 (1931); McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945). However, Collier, upon which the Lower Court relies, further provides that:

"The idea of supremacy of state law is confined to the field just discussed, i.e., what constitutes a perfection of a transfer. The question of whether the transfer is preferential and avoidable by the trustee is governed by Section 547. Thus, a state rule that a creditor may be preferred and if able to obtain the property before its seizure under process, can hold it for his debt, must yield to the provisions of Section 547. What constitutes the



general framework of Section 547 is a federal question, whether presented in a state or federal court, upon which the United States Supreme Court is the final arbiter."

See Collier on Bankruptcy, Paragraph 547.46

(15th ed.). This is what the Court recognized in Cox when it stated that:

"The current Maryland wage garnishment statute places an attaching judgment creditor in a position analogous to Grain Merchants. A writ of garnishment may well be a duly perfected lien on wages yet to be earned such that a creditor on a simple contract cannot acquire a judicial lien that is superior to the rights of a judgment creditor. 11 U.S.C. Section 547(e)(1)(B) (Supp. III 1979). Nonetheless, the avoidance powers under Section 547(b) extend to the avoidance of transfers rather than perfection of liens. Inasmuch as Section 547(e)(3) establishes that a transfer does not occur until the debtor has rights in the collateral, the transfer of wages garnished pursuant to a writ of garnishment cannot occur until the judgment debtor has earned the wages garnished.

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of the United States  
at the City of New York  
in the year of our Lord  
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The United States of America

Do hereby certify that

the following is a true and correct copy

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Thus, a payment on a garnishment attributable to wages earned by the debtor within ninety days of the filing of a bankruptcy petition is a preferential transfer to the judgment creditor."

See In Re Cox, 10 BR 268, 271-272 (D.Md. 1981). Therefore, it is apparent that the explicit intent of Congress as expressed in Section 547(e)(3) controls the determination of whether the transfer is preferential, regardless of what State garnishment law provides.

In Grain Merchants, the United States Court of Appeals for the Seventh Circuit properly concluded under Section 9-204(3) of the Uniform Commercial Code that the creditor has a valid and perfected floating lien on after-acquired property pursuant to State law. Congress, in the passage of Section 547(e)(3), overruled Grain Merchants because the Court's ruling advantaged one creditor

There is a provision in the  
law of England that no  
person shall be liable  
to be taken into custody  
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to the detriment of others, thus violating the primary purpose of both the Bankruptcy Act and Section 547. The Court's ruling in the case at issue also violates the policy behind the Bankruptcy Act and Section 547, and is clearly contrary to Congressional intent.

The Grain Merchants situation is clearly analogous to the instant case. Both property interests are perfected pursuant to State law, giving the creditor a priority over other creditors in regards to that property. However, in the passage of Section 547(e)(3), Congress clearly intended that, for purposes of the Bankruptcy Act, such a creditor would not have a priority position in respect to property acquired by the Debtor within the 90 day preference period. In this respect, the Bankruptcy Act clearly controls State law.



Petitioner further asserts that, under Indiana law, there is no novation of the Debtor's interest in his wages upon the issuance of a garnishment order. The Indiana statutes make it clear that the garnishment attaches to the "earnings of an individual", a fact relied upon by the Court in In Re Evans, 16 B.R. 731 (N.D.Ga. 1982), holding a preference had occurred. See generally Indiana Code Section 24-4.5-5-104, 105, 106 (1976); see also Indiana Code Section 24-4.5-11-1 et seq. (1976); Indiana Code Section 34-1-44-7 (1976). Furthermore, the plain language of Indiana Code Section 34-1-11-21, "in his hands or due and owing from him to the Defendant", makes it clear that the garnishee is only accountable for the wages which have actually been earned by the Debtor. Therefore, even applying State



law, it is clear that the Debtor's wages are not transferred until actually earned by the Debtor.

The Lower Court attempts to distinguish this case from Grain Merchants based on the irrevocability of the State Court garnishment order. This is clearly in error.

First, the State statute is irrelevant given the express intent of Congress as to when a transfer occurs. Secondly, the garnishment order is revocable in at least two situations: (1) where it is paid off; and (2) where the Debtor changes employment.

Each of these events would terminate any effect of a court-ordered garnishment of wages. Clearly, the 10% garnishment order is revocable and does provide the Debtor with a retained future interest similar to the filing of financing statements in Grain Merchants.

It is clear that the Director would not be interested until actually asked by the

Director.

The Director would attempt to distinguish this from other similar cases in the past, and if he finds that the case is not similar, he would not be interested. This is clear in every

case. The Director would not be interested in a case unless it is a case of a similar nature. The Director would not be interested in a case unless it is a case of a similar nature. The Director would not be interested in a case unless it is a case of a similar nature. The Director would not be interested in a case unless it is a case of a similar nature.

It is clear that the Director would not be interested in a case unless it is a case of a similar nature. The Director would not be interested in a case unless it is a case of a similar nature. The Director would not be interested in a case unless it is a case of a similar nature. The Director would not be interested in a case unless it is a case of a similar nature.

Director.

## CONCLUSION

Only the granting of a Writ of Certiorari will abate the confusion generated by this issue among the several federal courts addressing it. Congress has addressed this issue and, as previously stated, the United States Supreme Court is the final arbitrator as to what Congress intended. Regardless of how the Court rules on the merits, the expediency of the bankruptcy system and uniformity in the construction of the Bankruptcy Act demands that this Court address this issue. Therefore, Petitioner respectfully requests that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the





Seventh Circuit made herein on March 1,  
1984.

Respectfully submitted,

*Gordon E. Gouveia*

---

GORDON E. GOUVEIA  
Attorney for Petitioner

Greco, Gouveia, Miller,  
Pera & Bishop  
518 East 86th Avenue  
Merrillville, Indiana 46410  
Telephone: (219) 738-2988

with current made for in 1870.

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*John E. Jones*

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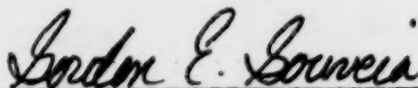
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CERTIFICATE OF SERVICE

I, Gordon E. Gouveia, attorney of record for the Petitioner herein, hereby certify that on June 20, 1984, service of the original and 39 copies of the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit with Appendix Attached was made upon the Supreme Court of the United States, together with three copies of said petition being served upon opposing counsel, Thomas Tuystchaevers, by placing same in the United States Mail, in packages properly addressed, certified mail - return receipt requested, and with sufficient first-class postage affixed thereto.



---

GORDON E. GOUVEIA  
Attorney for Petitioner  
518 East 86th Avenue  
Merrillville, Indiana 46410  
Telephone: (219) 738-2988

TESTIMONY OF WITNESS

I, William E. Swenson, Attorney at Law

for the Plaintiff, John A. Swenson, do hereby certify

that on or about the 20th day of May, 1931, I was

present and in the office of the Plaintiff

and saw him sign a check for the sum of

Twenty Dollars (\$20.00) for the Plaintiff

and the same was cashed by the Plaintiff

and the money was paid to the Plaintiff

and the same was cashed by the Plaintiff

and the same was cashed by the Plaintiff

and the same was cashed by the Plaintiff

and the same was cashed by the Plaintiff

and the same was cashed by the Plaintiff

and the same was cashed by the Plaintiff

and the same was cashed by the Plaintiff

John A. Swenson

Plaintiff

Attorney at Law

and have not known

any other person who

has signed such a check

Per Curiam Opinion  
JUDGMENT -- WITHOUT ORAL ARGUMENT  
UNITED STATES COURT OF APPEALS  
For the Seventh Circuit  
Chicago, Illinois 60604

Before

Hon. WALTER J. CUMMINGS, Chief Judge  
Hon. RICHARD A. POSNER, Circuit Judge  
Hon. JOHN L. COFFEY, Circuit Judge

No. 83-1226	) Appeals from
IN THE MATTER OF:	) the United
DAVID WAYNE COPPIE &	) States Bank-
BETTY ANN COPPIE,	) ruptcy Court
Debtors.	) for the
APPEAL OF:	) Northern Dis-
GORDON E. GOUVEIA, Trustee.	) trict of Indi-
-----	) ana, Hammond
No. 83-1227	) Division.
IN THE MATTER OF:	) No. 81-B-60431;
RAY MARVIN McCOWEN,	) No. 81-B-60020;
Debtor.	) RUSSELL H.
APPEAL OF:	) NEHRIG, JUDGE.
GORDON E. GOUVEIA, Trustee.)	

This cause came before the Court for  
decision on the record from the United A-1

Per Bureau Order

URGENT - 11:00 PM 10/10/50

TO DIRECTOR, FBI

FROM SAC, NEW YORK (100-100000)

SUBJECT: [REDACTED]

NY 100-100000

RE NEW YORK TELETYPE TO BUREAU, OCTOBER TEN LAST.

RE NEW YORK TELETYPE TO BUREAU, OCTOBER NINE LAST.

RE NEW YORK TELETYPE TO BUREAU, OCTOBER EIGHT LAST.

RE NEW YORK TELETYPE TO BUREAU, OCTOBER SEVEN LAST.

RE NEW YORK TELETYPE TO BUREAU, OCTOBER SIX LAST.

RE NEW YORK TELETYPE TO BUREAU, OCTOBER FIVE LAST.

RE NEW YORK TELETYPE TO BUREAU, OCTOBER FOUR LAST.

RE NEW YORK TELETYPE TO BUREAU, OCTOBER THREE LAST.

RE NEW YORK TELETYPE TO BUREAU, OCTOBER TWO LAST.

RE NEW YORK TELETYPE TO BUREAU, OCTOBER ONE LAST.

RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER THIRTY LAST.

RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER TWENTY LAST.

RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER NINETEEN LAST.

RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER EIGHTEEN LAST.

RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER SEVENTEEN LAST.

RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER SIXTEEN LAST.

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RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER FOURTEEN LAST.

RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER THIRTEEN LAST.

RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER TWELVE LAST.

RE NEW YORK TELETYPE TO BUREAU, SEPTEMBER ELEVEN LAST.

States Bankruptcy Court for the Northern  
District of Indiana, Hammond Division.

On consideration whereof, IT IS ORDERED  
AND ADJUDGED by this Court that the judgment  
of the said Bankruptcy Court in this cause  
appealed from be, and the same is hereby,  
AFFIRMED, with costs, in accordance with the  
opinion of this Court filed his date.

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

RECEIVED

APR 10 1950

FROM

DR. J. H. DILLON

TO

DR. J. H. DILLON



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

No. 83-1226

IN THE MATTER OF:

DAVID WAYNE COPPIE & BETTY ANN COPPIE,  
Debtors.

APPEAL OF:

GORDON E. GOUVEIA, Trustee.

---

NO. 83-1227

IN THE MATTER OF:

RAY MARVIN McCOWEN,  
Debtor.

APPEAL OF:

GORDON E. GOUVEIA, Trustee.

---

Appeals from the United States Bankruptcy  
Court for the Northern District of  
Indiana, Hammond Division.

Nos. 81 B 60431 & 82 B 60020

Russell H. Nehrig, Judge.

THE  
RIGHT OF THE  
PEOPLE TO KNOW  
THEIR GOVERNMENT

1911-12

IN THE

STATE OF

THE

PEOPLE

VS.

THE

GOVERNMENT

OF THE

STATE

OF

THE



THE

PEOPLE

VS.

THE

GOVERNMENT

SUBMITTED FEBRUARY 9, 1984\*

DECIDED MARCH 1, 1984

Before CUMMINGS, Chief Judge, POSNER and COFFEY, Circuit Judges.

PER CURIAM. These cases present the issue of whether the garnishment of a debtor's wages within ninety days of when the debtor filed a petition in bankruptcy, pursuant to a garnishment order issued more than ninety days before filing of the petition, constitutes a preferential transfer avoidable by the trustee. We agree with the bankruptcy judge that, under Indiana law, it is not and affirm the judgment below.

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\* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed.R.App.P; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.



# I.

The factual circumstances of the two cases before us do not differ significantly. In each case, an Indiana court issued a garnishment order against the debtor's wages more than ninety days prior to the debtor's filing of a chapter 7 petition in bankruptcy and the debtor's wages were garnished within the ninety-day period. Following the debtor's discharges, the trustee commenced the instant actions to recover the wages garnished as preferential transfers. See 11 U.S.C. Section 547(1982). The bankruptcy judge held that the garnished wages did not constitute preferences. The trustee appealed, both parties agreeing to appeal directly to this court. See 28 U.S.C. Section 1293(b) (Supp. IV 1980); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, Section 405(c)(2), 92 Stat. 2685; In Re UNR Industries, Inc., No. 83-1746, slip op. at 4-5 (7th Cir. Jan. 17, 1984).



## II.

Many courts have confronted the factual situation before us here, but there is no consensus as to whether the garnishment in this situation constitutes a preferential transfer.<sup>1</sup> The different results are often, though not always, attributable to varying state law because state law governs in determining when a transfer of the debtor's property has occurred. See cases cited supra note 1; 4 Collier on Bankruptcy, Paragraph 547.46 (15th ed.).

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<sup>1</sup> See, e.g., In Re Riddervold, 647 F.2d 342 (2d Cir. 1981) (applying New York law); In Re Certain, 30 Bankr. 379 (Bankr. D. Conn. 1983); In Re Yamamoto, 21 Bankr. 58 (Bankr. D. Haw. 1982); In Re TMIC Industrial Cleaning Co., 19 Bankr. 397 (Bankr. W.D. Mo. 1982); In Re Brinker, 12 Bankr. 936 (Bankr. D. Minn. 1981); In Re Woodman, 8 Bankr. 686 (Bankr. W.D. Wis. 1981) (no preference). Contra In Re Stoddard, 23 Bankr. 226 (Bankr. S.D.N.Y. 1982) (applying Virginia law); In Re Larson, 21 Bankr. 264 (Bankr. D. Utah 1982); In Re Walden, 19 Bankr. 901 (Bankr. E.D. Tenn. 1982); In Re Mayo, 19 Bankr. 630 (Bankr. E.D. Va. 1981); In Re Eggleston, 19 Bankr. 280 (Bankr. M.D. Tenn. 1982); In

These results show the general character  
of the system as a whole and show that  
the system is in general in good  
condition. The data for the year  
1951 shows a slight increase in  
the number of cases and a slight  
decrease in the number of deaths.  
The data for the year 1952 shows  
a slight increase in the number of  
cases and a slight decrease in the  
number of deaths.

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a slight increase in the number of  
cases and a slight decrease in the  
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a slight increase in the number of  
cases and a slight decrease in the  
number of deaths. The data for the  
year 1960 shows a slight increase  
in the number of cases and a slight  
decrease in the number of deaths.



In Indiana, the garnishee is accountable, from the date of the garnishment summons is served, to the plaintiff for any money he owes to the judgment debtor. Ind. Code Section 34-1-11-21 (1976). Following a hearing, a court may order, as apparently happened here, that the judgment be a continuing lien on the future income of the debtor, i.e., continuous garnishment. Ind. Code Section 34-1-44-7 (1976). At the time of the garnishments at issue here, this continuing lien could not exceed 10% of the debtor's income. Id. In this respect, the Indiana statutes involved in In Re Riddervold, 647 F.2d 342 (2d Cir. 1981), in that the statutes, in effect, worked a novation of 10% of the debtor's salary. Following court orders

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1 continued

Re Evans, 16 Bankr. 731 (Bankr. N.D. Ga. 1982); In Re Emery, 13 Bankr. 689 (Bankr. D. Vt. 1981); In Re Brengle, 10 Bankr. 360 (Bankr. D.Del. 1981); In Re Cox, 19 Bankr. 268 (Bankr. D.Md. 1981) (preference.



that the liens on these debtor's future income be continuous, the debtors no longer had a property interest in 10% of their future salaries. See In Re Woodman, 8 Bankr. 686, 688 (Bankr. W.D. Wis. 1981). Rather, the employers owed that portion of their salaries directly to the garnishment plaintiffs and were liable to the plaintiffs for those amounts if the wages were not withheld pursuant to the court orders. True, the employers were not liable until the wages were actually earned, but once the court orders were entered the debtors were no longer legally entitled to 10% of their future salaries. Because the court orders legally transferred 10% of the debtor's wages to the garnishment plaintiffs, there were no transfers at the time of the actual garnishments in question. The Bankruptcy Judge ruled correctly that because no transfer of the debtors' property occurred within ninety days of the filing of



the petition, there was no avoidable preference in either of the cases before us.

The debtors argue that Section 547(e)(3)<sup>2</sup> requires a different result. We disagree. This section was enacted to overrule this court's decision in Grain Merchants of Indiana, Inc., v. Union Bank and Savings Co., 408 F.2d 209 (7th Cir. 1969). Sen Rep. No. 95-989, 95th Cong., 2d Sess. 89 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News, 5963, 6330. In Grain Merchants, this Court held that rights acquired in accounts receivable within the preference period were not a preference with the bank's security interest in after-acquired accounts receivable was perfected more than four months prior to the filing of the bankruptcy petition. Although there are factual similarities

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<sup>2</sup> 11 U.S.C. Section 547(e)(3) (1982) states: "For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred."



between Grain Merchants and the cases before us, the analogy is not perfect. The most important distinction is that under Indiana law, the debtors retained no interest in 10% of their future wages following the entry of the garnishment orders. In contrast, the filing of financing statements in Grain Merchants did not transfer ownership of the debtor's future accounts receivable; that debtor would acquire some rights in the future accounts receivable when the accounts receivable came into existence. Section 547 (e)(3) does not come into play in this case simply because after a garnishment order providing for a continuing lien is entered in Indiana, a debtor will never acquire rights in the portion of his or her wages to be garnished in the future. Once a garnishment order has been entered by a court, the debtor's rights in 10% of his or her future wages are irrevocably transferred to the





garnishment plaintiff.

Accordingly, we affirm the order of the  
bankruptcy judge.

A true Copy:

Teste:

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Clerk of the United States  
Court of Appeals for the  
Seventh Circuit

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DEPARTMENT OF THE ARMY

WASHINGTON, D. C.

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

March 30, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

No. 83-1226

IN THE MATTER OF:

DAVID WAYNE COPPIE &  
BETTY ANN COPPIE,  
Debtors.

APPEAL OF:

GORDON E. GOUVEIA, Trustee.

-----

No. 83-1227

IN THE MATTER OF:

RAY MARVIN McCOWEN,  
Debtor.

APPEAL OF:

GORDON E. GOUVEIA, Trustee.

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) Appeals from  
) the United  
) States Bank-  
) ruptcy Court  
) for the  
) Northern Dis-  
) trict of  
) Indiana,  
) Hammond  
) Division.  
) No. 81-B-60431;  
) No. 81-B-60020  
)  
) RUSSELL H.  
) NEHRIG, JUDGE.

O R D E R

On consideration of the petition for  
rehearing and suggestion for rehearing A-12

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REPORTER'S RECORD

Vol. 1, 1908

Table

How many times a case has been argued

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en banc filed in the above-entitled cause by Gordon E. Gouveia, Trustee, no judge in active service has required a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.



UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT GARY

IN RE:	)	
	)	
DAVID WAYNE COPPIE and	)	BANKRUPTCY
BETTY ANN COPPIE,	)	NO. 81-60431
	)	
Debtors.	)	
*****	)	
	)	
GORDON E. GOUVEIA, Trustee,	)	
	)	
Plaintiff,	)	ADVERSARY
	)	NO. 82-6094
vs.	)	
	)	
HAMMOND CLINIC,	)	
	)	
Defendant.	)	

O R D E R

The court hereby determines that the wages withheld from the debtor's wages by the Hammond Clinic pursuant to a garnishment order issued on December 3, 1980, by the Lake County Superior Court do not constitute

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

LABORATORY OF PHYSICAL CHEMISTRY



1953

The first part of the experiment was to determine the rate of reaction between the reactants. The results showed that the reaction was first order with respect to the concentration of the reactants. The second part of the experiment was to determine the activation energy of the reaction. The results showed that the activation energy was approximately 10 kcal/mole.



a preference.

ENTERED: 12-28-82

/s/

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RUSSELL H. NEHRIG  
BANKRUPTCY JUDGE

MEMORANDUM

The debtors, David and Betty Coppie, filed a Chapter 7 petition in bankruptcy on March 20, 1981. Prior to this filing, on December 3, 1980, the Lake County Superior Court issued a garnishment order in favor of Hammond Clinic against the debtor's wages. Between December 21, 1980, and March 20, 1981, a period of 90 days prior to the bankruptcy filing, Hammond Clinic garnished the sum of \$608.01 from the wages of the debtor. On May 26, 1982, the trustee in this matter filed this complaint for the turnover of this allegedly preferential transfer.

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The issue in this case is whether a bankruptcy trustee may avoid the transfer of monies within the 90 day period prior to a bankruptcy filing which has been withheld pursuant to a garnishment order obtained prior to the start of the 90 day period. Hammond Clinic argues that where the garnishment summons is served prior to the 90 day preference period, the garnishment is unavoidable even if monies were deducted within the 90 day period. The trustee argues that the mere collection of the monies pursuant to the summons within the 90 day preference period compels the avoidable of the transaction.

The treatment of voidable preferences through the Bankruptcy Code is found at 11 U.S.C. Section 547(b) (1978), which provides:

Except as provided as in subsection (c) of this section, the trustee may avoid any transfer of the property of the debtor-



- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made -
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer -
    - (i) was an insider; and
    - (ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and
- (5) that enables such creditor to receive more than such creditor would receive if -
  - (A) the case were a case under Chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided

(1) The first of these is the fact that the

(2) The second of these is the fact that the

(3) The third of these is the fact that the

(4) The fourth of these is the fact that the

(5) The fifth of these is the fact that the

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(11) The eleventh of these is the fact that the

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(14) The fourteenth of these is the fact that the

by the provisions  
of this title.

Recovery of property by the trustee under this section presumes that there has been a transfer of property of the debtor. Section 547(b). The debtor's wages, prior to the service of the garnishment summons, are the debtor's property. The garnished wages seem to lose their character as the debtor's property upon the service of the garnishment summons. Ind. Code Section 34-1-11-21 provides: "From the date of the service of the summons, the garnishee shall be accountable to the plaintiff in the action for the amount of money, property or credits in his hands, or due and owing from him to the defendant". Therefore, since the transfer occurred at the time the summons and complaint were served, the garnishments in this case are not avoidable as preferences since this transfer occurred outside the 90 day period. Matter of Woodman, 8 Bankr. Rep. 686, 687 (Bankr. W.D. Wis. 1981).

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To determine whether the transfer of the debtor's property was perfected at the time of the serving of the garnishment summons, Section 547(e)(1)(B) provides that a transfer is perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee". While interpreting a provision in the Wisconsin Statutes identical to Ind. Code Section 34-1-11-21, the Wisconsin Supreme Court concluded:

Under the law of Wisconsin, the service of a summons and complaint in a garnishment action . . . creates an equitable lien on the indebtedness of the garnishee defendant to the principal defendant.

Elliott v. Regan, 274 Wis. 298, 302, 79 N.W. 2d 657 (1956). Thus, the lien created by the garnishing creditor's service of the garnishment summons dates from the service of the summons. This lien acquires a distribution status which is superior to an after acquired lien. Indiana Law, there-



fore, allows the perfection of a lien acquired by a garnishment to date from the time of the service of the garnishment summons and complaint.

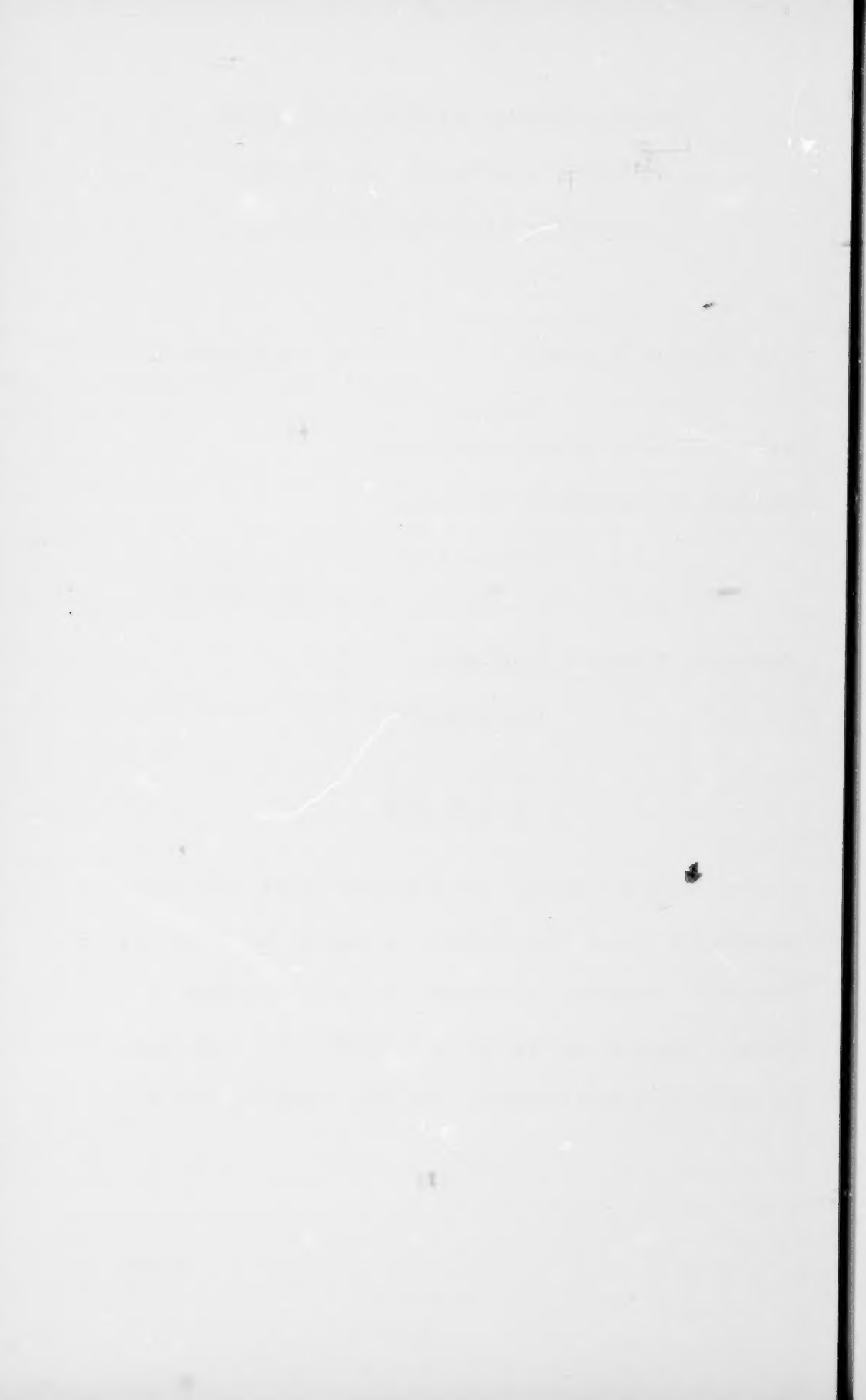


UNITED STATES BANKRUPTCY COURT  
 NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT GARY

IN RE:	)	
	)	
RAY MARVIN McCOWEN,	)	BANKRUPTCY
	)	NO. 82-60020
Debtor.	)	
*****	)	
	)	
GORDON E. GOUVEIA, Trustee,	)	
	)	
Plaintiff,	)	ADVERSARY
	)	NO. 82-6095
vs.	)	
	)	
GENERAL FINANCE COMPANY,	)	
	)	
Defendant.	)	

O R D E R

The court hereby determines that the wages withheld from the debtor's wages by General Finance Company pursuant to a garnishment order issued on March 20, 1980, by the Lake County Circuit Court, do not constitute a



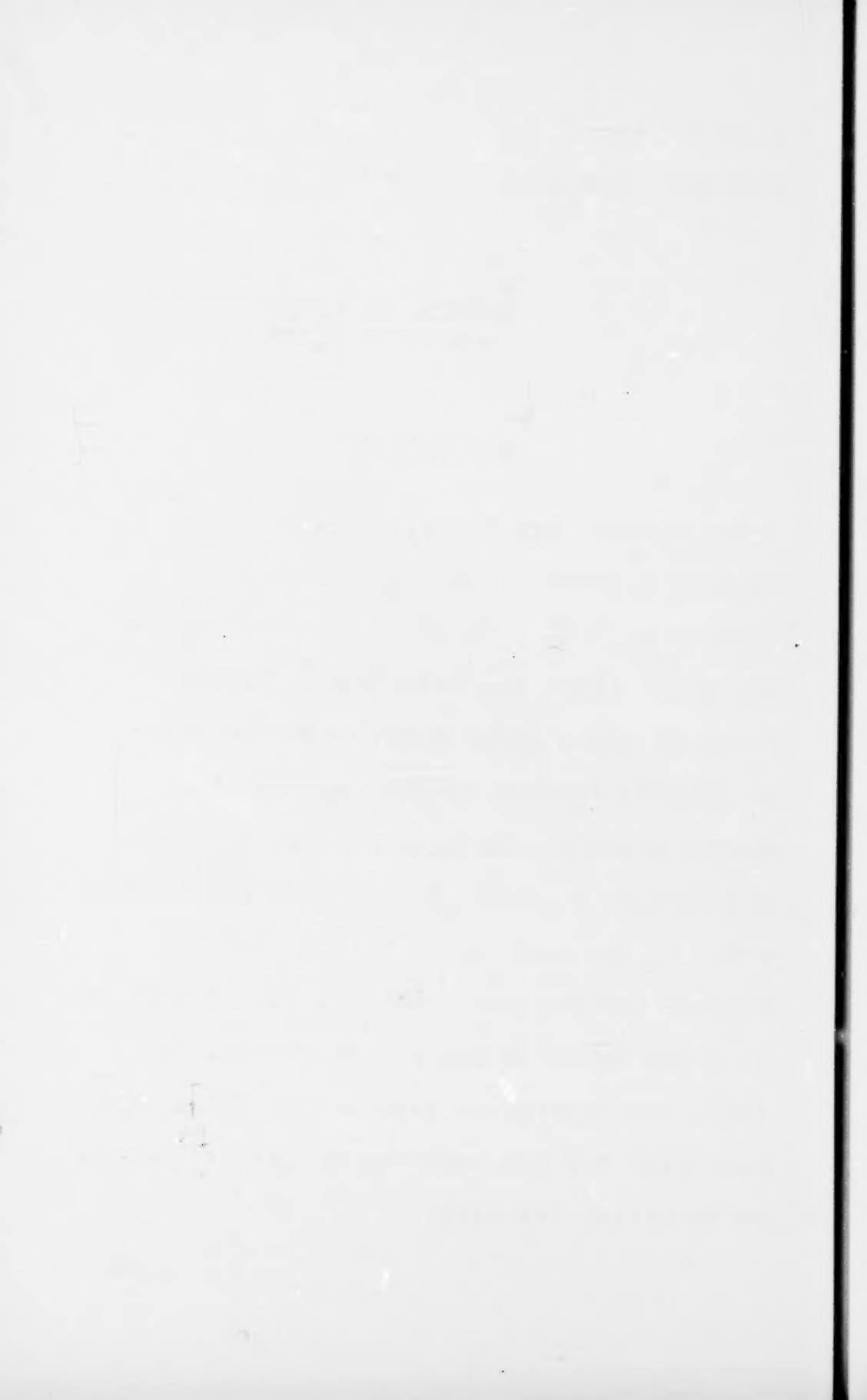
a preference.

ENTERED: December 30, 1982

/s/  
\_\_\_\_\_  
RUSSELL H. NEHRIG  
BANKRUPTCY JUDGE

MEMORANDUM

The debtor, Ray Marvin McCowen, filed a chapter 7 petition in bankruptcy on January 8, 1982. Prior to this filing, on March 20, 1980, the Lake County Circuit Court issued a garnishment order in favor of General Finance Company against the debtor's wages. Between October 11, 1981, and January 8, 1982, a period of ninety days prior to the bankruptcy filing, General Finance Company garnished the sum of \$764.36 from the debtor's wages. On October 25, 1982, the trustee in this matter filed this complaint for the turnover of this allegedly preferential transfer.





The issue in this case is whether a bankruptcy trustee may avoid the transfer of monies within the 90 day period prior to a bankruptcy filing which has been withheld pursuant to a garnishment order obtained prior to the start of the 90 day period. General Finance argues that where the garnishment summons is served prior to the 90 day preference period, the garnishment is unavoidable even if monies were deducted within the 90 day period. The trustee argues that the mere collection of the monies pursuant to the summons within the 90 day preference period compels the avoidance of the transaction.

The treatment of voidable preferences through the Bankruptcy Code is found at 11 U.S.C. Section 547(b) (1978), which provides:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of the property of the debtor --

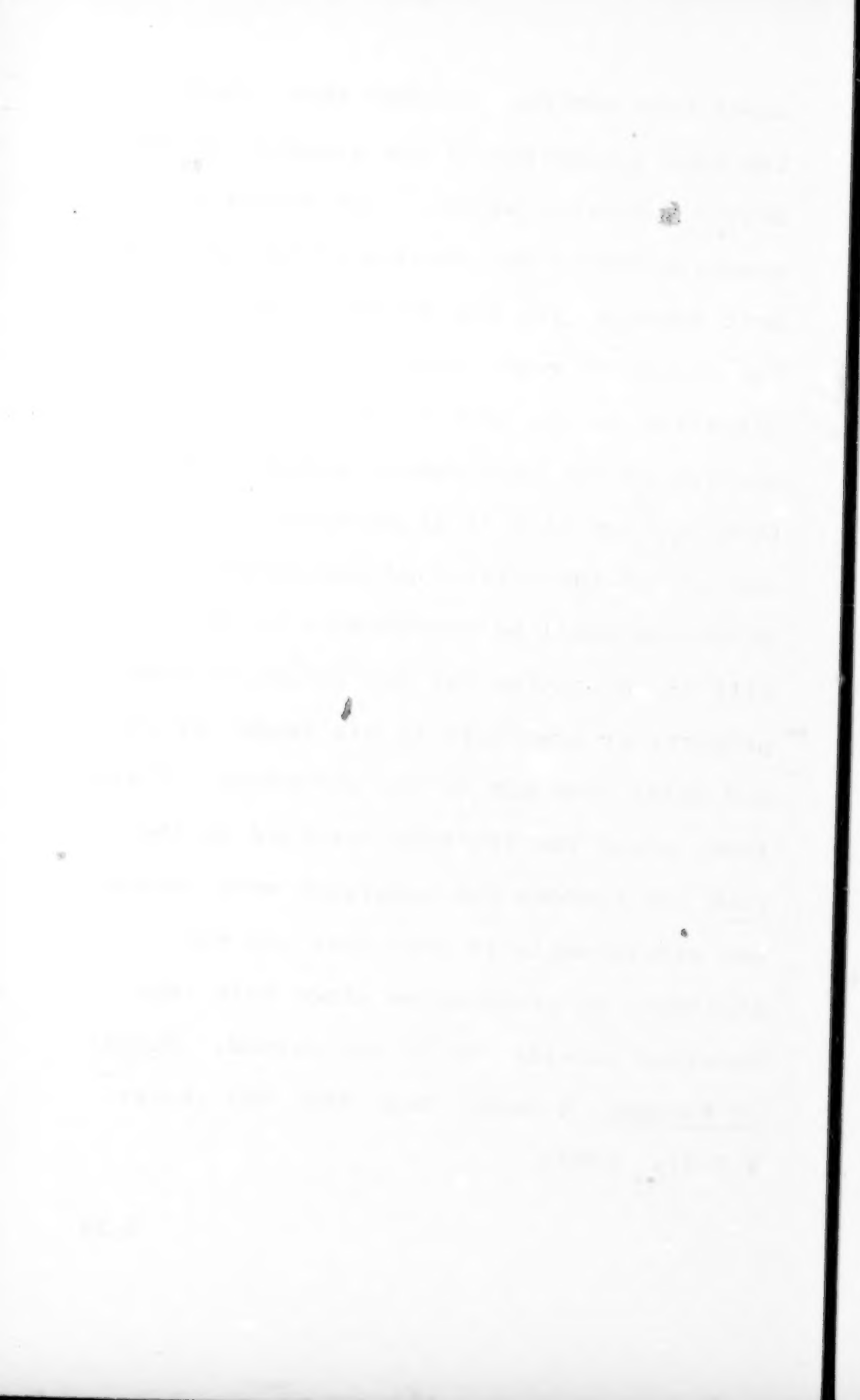


- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made --
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (b) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer--
    - (i) was an insider; and
    - (ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and
- (5) that enables such creditor to receive more than such creditor would receive if -
  - (A) the case were a case under Chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The recovery of property by the trustee



under this section presumes that there has been a transfer of the property of the debtor. Section 547(b). The debtor's wages, prior to the service of the garnishment summons, are the debtor's property. The garnished wages seem to lose their character as the debtor's property upon the service of the garnishment summons. Ind. Code Section 34-1-11-21 provides: "From the day of the service of the summons, the garnishee shall be accountable to the plaintiff in the action for the amount of money, property or creditors in his hands, or due and owing from him to the defendant. Therefore, since the transfer occurred at the time the summons and complaint were served, the garnishments in this case are not avoidable as preferences since this case occurred outside the 90 day period. Matter of Woodman, 8 Bankr. Rep. 686, 687 (Bankr. W.D.Wis. 1981).



To determine whether the transfer of the debtor's property was perfected at the time of the serving of the garnishment summons, Section 547(e)(1)(B) provides that a transfer is perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee". While interpreting a provision in the Wisconsin Statutes identical in language to Ind. Code Section 34-1-11-21, the Wisconsin Supreme Court concluded:

Under the law of Wisconsin, the service of a summons and complaint in a garnishment action . . . creates an equitable lien on the indebtedness of the garnishee defendant to the principal defendant.

Elliott v. Regan, 274 Wis. 298, 302, 79 N.W. 2d 657 (1956). Thus, the lien created by the garnishing creditor's service of the garnishment summons dates from the service of the summons. This lien acquires a distribution statutes which is superior to





an after acquired lien. Indiana Law,  
therefore, allows the perfection of a lien  
acquired by a garnishment to date from the  
time of the service of the garnishment  
summons and complaint.



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT GARY

IN RE:	)	
	)	
DAVID WAYNE COPPIE and	)	CASE
BETTY ANN COPPIE,	)	NO. 81-60431
	)	
Debtors;	)	
*****	)	
	)	
GORDON E. GOUVEIA,	)	
Trustee,	)	
	)	
Plaintiff,	)	ADVERSARY
	)	PROCEEDING
vs.	)	NO. 82-6094
	)	
HAMMOND CLINIC,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL TO DISTRICT COURT

Notice is hereby given that Gordon E. Gouveia, trustee of the estate of the above-captioned debtors, appeals to the United States District Court for the Northern District of Indiana, Hammond Division, from the Order of this Court entered December 28, 1982, a copy of which is attached hereto.



The party to the Order appealed from and the name and address of its attorney is as follows:

Thomas Tuytschaevers  
Borns, Quinn, Kopko & Lindquist  
Attorneys for Hammond Clinic  
1000 East 80th Place  
Merrillville, Indiana 46410

Dated at Merrillville, Indiana, this 6th day of January, 1983.

/s/  
GORDON E. GOUVEIA  
Attorney for Trustee  
518 East 86th Avenue  
Merrillville, Indiana 46410  
Telephone: (219) 738-2988

The party is now being organized

and the name will be given to the

following

Thomas J. [unclear]  
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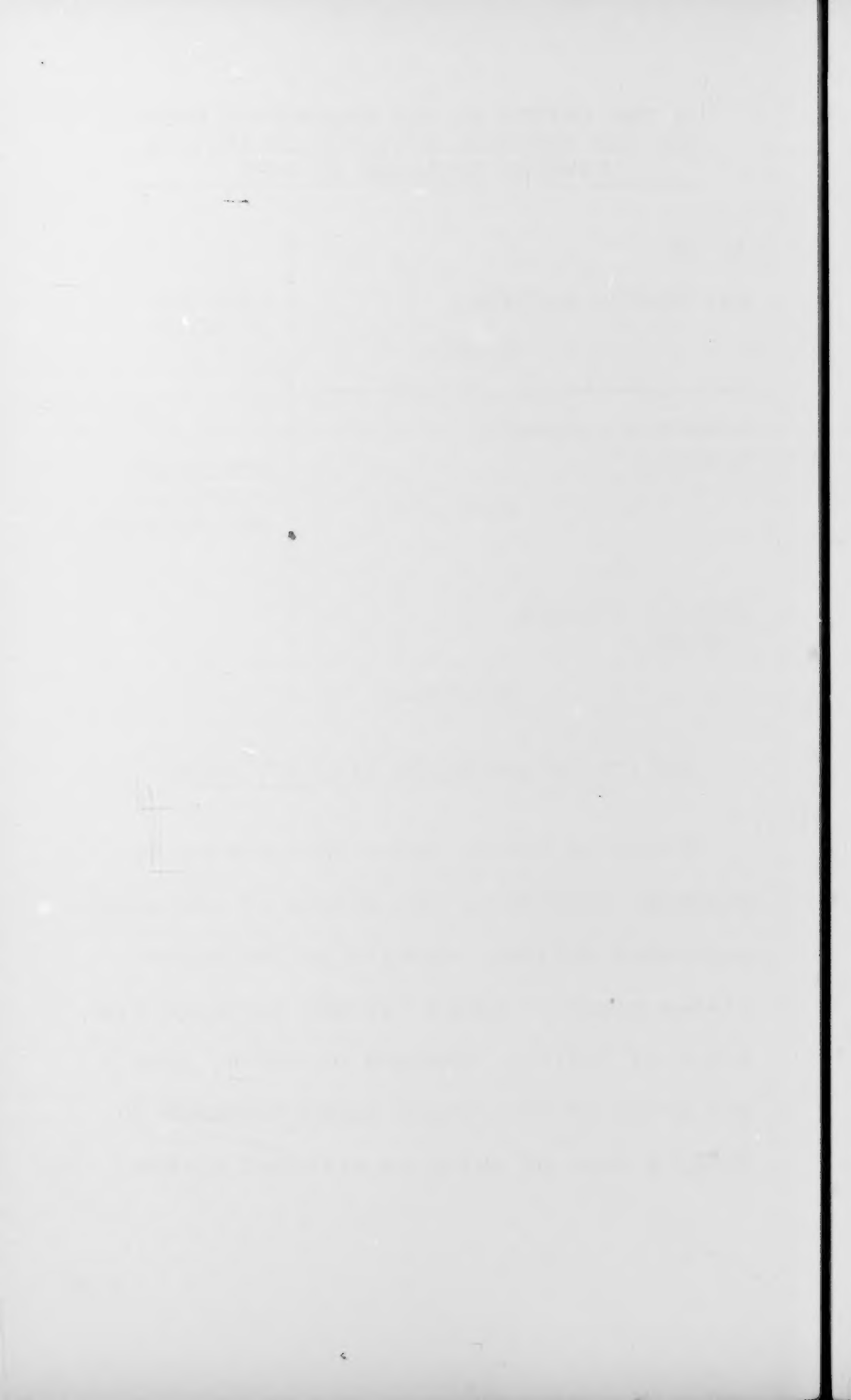
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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT GARY

IN RE:	)	
	)	
RAY MARVIN McCOWEN,	)	CASE NO.
	)	82-60020
Debtor;	)	
*****	)	
	)	
GORDON E. GOUVEIA,	)	
Trustee,	)	ADVERSARY
	)	PROCEEDING
Plaintiff,	)	NO. 82-6095
	)	
vs.	)	
	)	
GENERAL FINANCE	)	
COMPANY,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL TO DISTRICT COURT

Notice is hereby given that Gordon E. Gouveia, trustee of the estate of the above-captioned debtors, appeals to the United States District Court for the Northern District of Indiana, Hammond Division, from the Order of this Court dated December 30, 1982, a copy of which is attached hereto.





The party to the Order appealed from and  
the name and address of its attorney is as  
follows:

Thomas Tuytschaevers  
Borns, Quinn, Kopko & Lindquist  
Attorneys for General Finance  
Company  
1000 East 80th Place  
Merrillville, Indiana 46410

Dated at Merrillville, Indiana, this  
6th day of January, 1983.

/s/  
GORDON E. GOUVEIA  
Attorney for Trustee  
518 East 86th Avenue  
Merrillville, Indiana 46410  
Telephone: (219) 738-2988



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT GARY

IN RE:	)	
	)	
DAVID WAYNE COPPIE and	)	CASE NO.
BETTY ANN COPPIE,	)	81-60431
	)	
Debtors;	)	
*****	)	
GORDON E. GOUVEIA,	)	
Trustee,	)	ADVERSARY
	)	PROCEEDING
Plaintiff,	)	NO. 82-6094
	)	
vs.	)	
	)	
HAMMOND CLINIC,	)	
	)	
Defendant.	)	

S T I P U L A T I O N

Come now Gordon E. Gouveia and Thomas  
Tuytschaevers, being the attorneys of record  
for the Plaintiff and Defendant respect-  
ively in the above-captioned adversary pro-  
ceeding, and stipulate that the Appeal filed  
by Gordon E. Gouveia from this Court's Order  
of December 28, 1982, be heard by the United



States Court of Appeals for the Seventh  
Circuit, without the need of an inter-  
mediate appeal, all in accordance with the  
provisions of 28 U.S.C.A. § 1293(b).

Executed at Merrillville, Indiana, this  
27th day of January, 1983.

/s/  
GORDON E. GOUVEIA  
Greco, Gouveia, Miller,  
Pera & Bishop  
Attorney for Plaintiff  
518 East 86th Avenue  
Merrillville, Indiana 46410  
Telephone: (219) 738-2988

/s/  
THOMAS TUYTSCHAEVERS  
Borns, Quinn, Kopko &  
Lindquist  
Attorney for Defendant  
1000 East 80th Place  
Merrillville, Indiana 46410  
Telephone: (219) 769-6671



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT GARY

IN RE:	)	
	)	
RAY MARVIN McCOWEN,	)	CASE NO.
	)	82-60020
Debtor;	)	
*****	)	
	)	
GORDON E. GOUVEIA,	)	
Trustee,	)	
	)	
Plaintiff,	)	ADVERSARY
	)	PROCEEDING
vs.	)	NO. 82-6095
	)	
GENERAL FINANCE	)	
COMPANY,	)	
	)	
Defendant.	)	

S T I P U L A T I O N

Come now Gordon E. Gouveia and Thomas  
Tuytschaevers, being the attorneys of record  
for the Plaintiff and Defendant respectively  
in the above-captioned adversary proceeding,  
and stipulate that the Appeal filed by  
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of December 30, 1982, be heard by the United





States Court of Appeals for the Seventh  
Circuit, without the need of an inter-  
mediate appeal, all in accordance with the  
provisions of 28 U.S.C.A. § 1293(b).

Executed at Merrillville, Indiana, this

27th day of January, 1983.

/s/

GORDON E. GOUVEIA  
Greco, Gouveia, Miller,  
Pera & Bishop  
Attorney for Plaintiff  
518 East 86th Avenue  
Merrillville, Indiana 46410  
Telephone: (219) 738-2988

/s/

THOMAS TUYTSCHAEVERS  
Borns, Quinn, Kopko &  
Lindquist  
Attorney for Defendant  
1000 East 80th Place  
Merrillville, Indiana 46410  
Telephone: (219) 769-6671

United States of America for the Seventh

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 10, 1983

By the Court:

IN THE MATTER OF:	)	Appeals from
	)	the United
DAVID WAYNE COPPIE &	)	States District
BETTY ANN COPPIE,	)	Court for the
Debtors.	)	Northern Dis-
	)	trict of Indiana,
No. 83-1226	)	Hammond Division.
	)	No. 81-B-60431,
APPEAL OF:	)	Hon. Russell H.
	)	Nehrig, <u>Judge</u> .
GORDON E. GOUVEIA,	)	
Trustee	)	

-----

IN THE MATTER OF:	)	
	)	
RAY MARVIN McCOWEN,	)	
Debtor.	)	No. 82-B-60020,
	)	Hon. Russell H.
No. 83-1227	)	Nehrig, <u>Judge</u> .
	)	
APPEAL OF:	)	
	)	
GORDON E. GOUVEIA,	)	
Trustee.	)	

O R D E R

The court, sua sponte, orders as follows:

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois

February 10, 1925

TO THE COURT:

IN RE APPLICATION OF

JOHN ALVIN WATSON &

JOSEPH W. COOPER

Debtors

VS. THE CREDITORS

APPEAL OF

ORDER OF DISTRICT

Court

IN THE MATTER OF

THE ESTATE OF

JOHN ALVIN WATSON

AND

JOSEPH W. COOPER

DEBTORS

VS. THE CREDITORS

ORDER

The court, and people, ordered as follows:

1.

(1) These appeals shall be consolidated for purposes of briefing and oral argument.

(2) The following schedule shall govern the disposition of these appeals:

a. The appellant-trustee shall file his consolidated brief and appendix on or before March 21, 1983.

b. The appellees' consolidated brief and appendix shall be filed on or before April 20, 1983.

c. The appellant-trustee shall file his consolidated reply brief, if any, on or before May 4, 1983.

2  
NO. 83-2112

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1984

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IN RE:

DAVID WAYNE COPPIE & BETTY ANN  
COPPIE, Debtors;

GORDON E. GOUVEIA, TRUSTEE,  
Petitioner,

vs.  
HAMMOND CLINIC,  
Respondent.

---

IN RE:

RAY MARVIN McCOWEN, Debtor;

GORDON E. GOUVEIA, TRUSTEE,  
Petitioner,

vs.  
GENERAL FINANCE COMPANY,  
Respondent.

---

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BRIEF IN OPPOSITION TO PETITION  
FOR CERTIORARI TO THE  
SUPREME COURT OF THE UNITED STATES  
BRIEF OF RESPONDENT

---

CLARENCE BORNS  
Attorney for Respondent  
Borns, Quinn & Lindquist  
1000 East 80th Place  
Merrillville, IN 46410  
Telephone: (219) 769-6671

QUESTION PRESENTED FOR REVIEW

Were the lower courts correct in interpreting Indiana law as holding that monies withheld from a debtor's earnings within ninety (90) days of the debtor's filing a petition in bankruptcy, pursuant to a state garnishment order issued more than ninety (90) days prior to the date of filing a petition in bankruptcy, did not constitute a transfer of property rights, thereby excluding the existence of a preferential transfer as defined in 11 U.S.C. § 547(b)(4)(A) (Supp. II 1978)?

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STATUTES INVOLVED

11 U.S.C. § 547(b)(4)(A) (Supp. II 1978)

provides:

[T]he trustee may avoid any transfer of property of the debtor made on or within ninety (90) days before the date of filing of the petition.

11 U.S.C. § 547(e)(3) (Supp. II 1978), in defining when a preferential transfer occurs, provides:

[A] transfer is not made until the debtor has acquired rights in the property transferred.

Ind. Code § 34-1-11-21 (1976) provides:

From the day of the service of the summons, the garnishee shall be accountable to the plaintiff in the action for the amount of money, property or credits in his hands, or due and owing from him to the defendant.



## REASONS FOR DENYING THE WRIT

The Courts below properly applied state law in determining when a transfer occurred.

The preferential transfer provision of the Bankruptcy Code does not address the problem of when a transfer of property has occurred, and the courts below were correct in resorting to state law to make that determination. Two distinct issues arise. First, the court must determine whether the wages garnished within ninety (90) day period were "transferred" by the debtor. Second, if the court finds that a transfer by the debtor was made within the ninety (90) day period, it must then determine whether it was a preferential transfer within the meaning of 11 U.S.C. § 547 (Supp. II 1978).

State law determines when a transfer has occurred since that law property rights are involved. In Re Connor, 733 F.2d 1560, 1562 (11th Cir. 1984); 4 Collier on Bankruptcy ¶ 5478.46 (15th ed.). See also Harbor National Bank of Boston v. Sid Kumins, Inc., 696 F.2d 9, 11 (1st Cir. 1982) (date of attachment of real estate is to be determined by state law).



The wording of Indiana's garnishee liability statute makes it clear that transfer of the debtor's property is completed upon service of the garnishment summons. "From the day of the service of the summons, the garnishee shall be accountable to the plaintiff. . . ." Ind. Code § 34-1-11-21. (emphasis added). Since the garnishee is liable to the creditor upon service of the summons, the transfer is complete upon such service, not upon payment of the actual monies to either the court or the creditor. The Seventh Circuit correctly held that since the issuance of the summons to the garnishee occurred more than ninety (90) days prior to the filing of bankruptcy by the debtor, the transfer of the debtor's property was therefore completed prior to the ninety day preference period. In Re Coppie, 728 F.2d 951 (7th Cir. 1984). Since the debtor had no property interest which was subject to transfer during the preference period, there could not be a "preferential transfer". The wages garnished during the ninety (90) day period could not be avoided by the trustee in bankruptcy. Other





states with similar statutes have reached the same result.

The Eleventh Circuit found a similar result. The court held that since a garnishment order was issued prior to the ninety (90) day preference period, no voidable transfers took place. In Re Conner, 733 F.2d at 1562. The court held that under applicable state law, a transfer occurred on the date the creditor caused the debtor's employer to be served with a summons of garnishment, not when the state court distributed the garnished funds to the creditor. Id. Just like Indiana law, the issuance of the summons in Conner was the point at which a property interest was transferred.

The Second Circuit also found a similar result. Under state statutes very similar to those of Indiana, the court held that there was no preferential transfer when the garnishment order was executed prior to the ninety day preference period. In Re Riddervold, 647 F.2d 342 (2d Cir. 1981). The court used the "continuing levy" theory announced by Judge L. Hand in In Re Sims, 176 F. 645 (S.D. N.Y. 1910)



to determine when a transfer occurred. After the summons was served, "the debtor ha[d] no property or interest in property subject to the levy which can be transferred. Service of the income execution on the employer in effect works a novation whereby the employer owes 10% of the employee's salary not to the employee but to the sheriff for the benefit of the judgment creditor." 647 F.2d at 346. The court of appeals thus used the same rationale as the Seventh Circuit in the instant case.

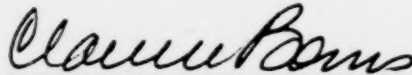
Since the court of appeals correctly held that wages earned and garnished within the ninety (90) days prior to a filing of bankruptcy were not "transferred", under Indiana law, the court did not have to decide upon the applicability of 11 U.S.C. § 547. "Once a garnishment order has been entered by a court, the debtor's rights in 10% of his or her future wages are irrevocably transferred to the garnishment plaintiff". 728 F.2d at 953. There was therefore nothing left which could be transferred.



CONCLUSION

Since the court of appeals correctly interpreted and applied Indiana law as to the occurrence of a transfer pursuant to a state garnishment order, this Court should deny the petition for a writ of certiorari.

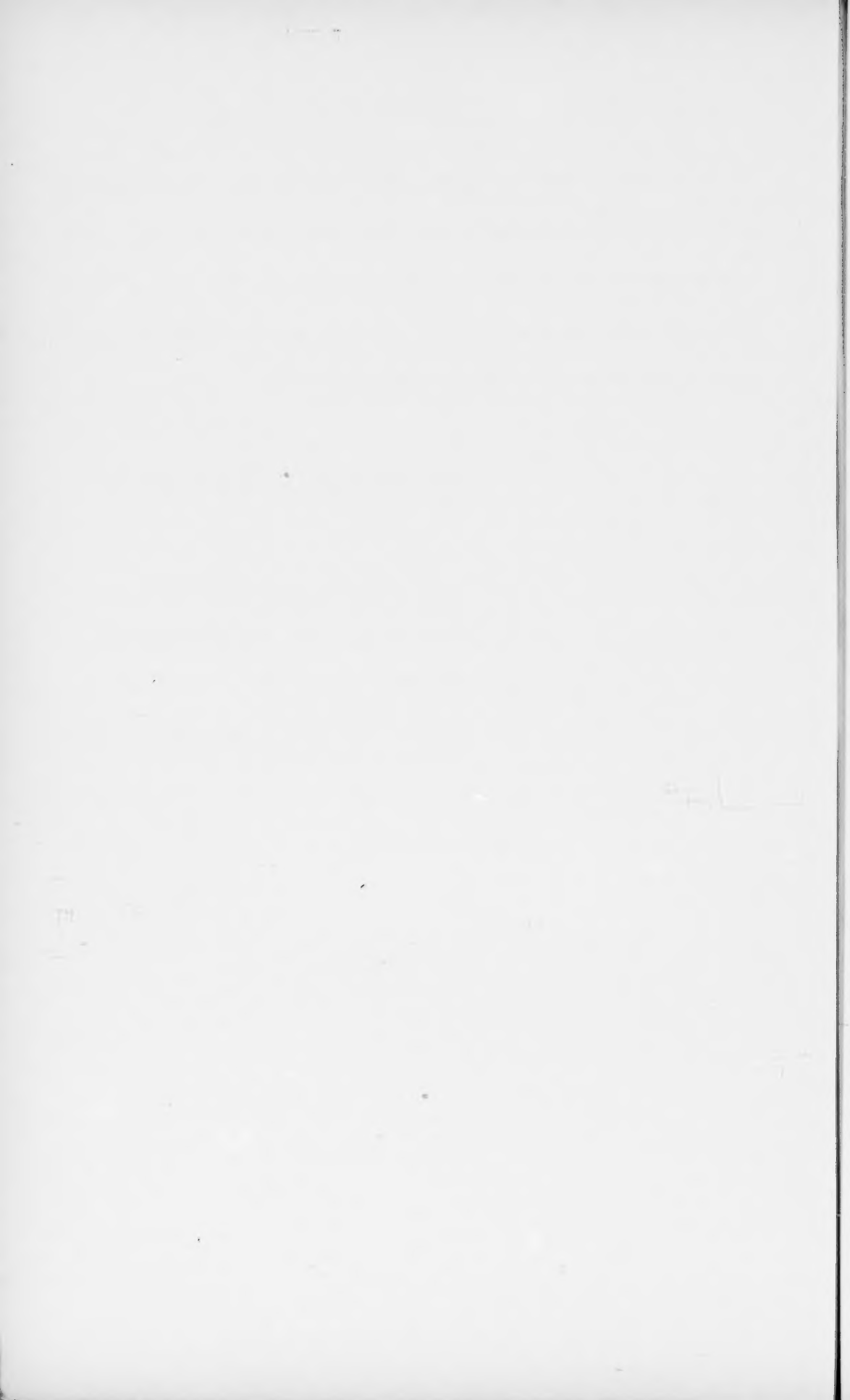
Respectfully submitted,

A handwritten signature in cursive script, reading "Clarence Borns".

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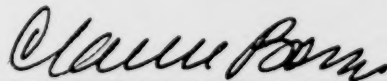
Clarence Borns  
Attorney for Respondents

Borns, Quinn & Lindquist  
1000 East 80th Place  
Merrillville, IN 46410  
Telephone (219) 769-6671



CERTIFICATE OF SERVICE

I, Clarence Borns, attorney of record for the Respondent herein, hereby certify that on November 29, 1984, service of the original and forty (40) copies of the foregoing Brief in Opposition to Petition for Certiorari to the Supreme Court of the United States was made upon the Supreme Court of the United States, together with three copies of said brief being served upon opposing counsel, Gordon E. Gouveia, by placing same in the United States Mail, in packages properly addressed, certified mail - return receipt requested, and with sufficient first-class postage affixed thereto.



---

Clarence Borns  
Attorney for Respondent

Borns, Quinn & Lindquist  
1000 East 80th Place  
Merrillville, IN 46410  
Telephone: (219) 769-6671